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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DETREX CORPORATION,
Petitioner,

v.

AMCAST INDUSTRIAL CORPORATION and
ELKHART PRODUCTS CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Petitioner Detrex Corporation ("Detrex") has asked the Court to resolve two significant issues involving the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[1] The economic impact of CERCLA has been profound and the regulated community has expended huge sums of money cleaning up sites of contamination. In addition, CERCLA's provisions have caused seemingly countless dollars to be spent litigating its intent and application.

Before this Court are two issues which, if allowed to stand, will frustrate the intent of Congress, increase litigation (and thus costs), and will bring under CERCLA's

[1] 42 U.S.C.A. §§ 9601 through 9675.

regulatory umbrella a substantial segment of American industry which the statute was never intended to regulate.[2] The judicial assets of this Court, while admittedly limited, should address and correct the clear error of the lower court so that the stated intent of Congress may be given full effect.

Respondents' Brief in Opposition ("Opposition Brief") does not defeat Detrex's arguments concerning the significance and magnitude of the federal questions raised and the conflicting decisions in the courts below. Respondents fail to adequately address Detrex's arguments concerning why the Petition for Writ of Certiorari ("Petition") should be granted. The doomsday predictions of Respondents concerning Detrex's arguments are not persuasive. This Reply Brief will demonstrate why this Court must reject the arguments raised in Respondents' Opposition Brief.

I. THIS APPEAL CONCERNS A SIGNIFICANT FEDERAL QUESTION INVOLVING CERCLA'S EXCEPTION TO THE DEFINITION OF FACILITY.

A. A Wide Range of the Environmentally Regulated Business Community, Including the Chemical and Transportation Industries, is Impacted by this Decision.

Detrex would argue on appeal that the exception to the definition of facility[3] is broader than the interpretation of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit"). The Seventh Circuit held that the exception is limited to facilities that contain consumer products and not to consumer products

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[2] For example, the Hazardous Materials Transportation Act, 49 U.S.C.A. §§ 1801, *et seq.*, protects against the dangers posed by the transportation of hazardous materials.

[3] 42 U.S.C.A. § 9601(9) at 82a of Detrex's Petition.

which are *contained in* such facilities or vessels. The Seventh Circuit misconstrued the intent of Congress when it added the "consumer product in consumer use or any vessel" exception to the definition of facility. Its decision renders the exception a complete nullity because it is not cans, or barrels, or containers that cause contamination, it is their contents which affect the environment when released. In this context, it is necessarily the contents of the facilities or vessels that are consumer products which also happen to be hazardous substances. It is these consumer products/hazardous substances to which Congress intended the exception to apply.

Congress intended for the exception to be broader in scope than the decision of the Seventh Circuit. Detrex believes that consumer products which are also hazardous substances in consumer use or in vessels must be excluded from the definition of facility under CERCLA in order to give effect to the stated intent of Congress. As the Court in *Dayton Indep. Sch. Dist. v. United States Mineral Prods. Co.*, 906 F.2d 1059, 1065 (5th Cir. 1990) held "[i]t is clear that Congress did not intend CERCLA to target *legitimate manufacturers or sellers of useful products*." (emphasis added). The Seventh Circuit's conclusion has a chilling impact upon the supply and transportation of consumer products that are also hazardous substances. Chemical manufacturers and suppliers, shippers, and common and contract carriers might not be able to avail themselves of this defense to CERCLA liability if the Court does not grant Detrex's Petition.

Unquestionably, this issue is important on a national scale. Tons of hazardous substances/consumer products are transported every year. Hundreds of thousands of shipments occur every day. These shipments of consumer products occur by truck, rail, and ship generating billions and billions of dollars in revenues for the transportation industry. *Respondents have conceded this point by fail-*

ing to even address it in their Opposition Brief. Nowhere in the Opposition Brief do they argue that this issue is not significant on a very broad scale as demonstrated by Detrex. The Court is requested to grant this Petition because the decision of the Seventh Circuit will negatively impact the chemical manufacturing, supply, and transportation industries; a result which was never intended by Congress. Even Respondents admit the importance of this issue.

The decision of the Seventh Circuit is, in effect, an attempt to jam a square peg into a round hole. That Court writes that its literal interpretation "is hard to beat." Petition at 8a. That literal interpretation, however, ignores common sense and at least one of the purposes underlying CERCLA. As members of this Court have pointed out, words of a statute are not to be construed in the abstract but, rather, they should be understood in their context within an act. In their dissent, in *Marek v. Chesny*, 473 U.S. 1, 16, 87 L. Ed. 2d 1, 105 S. Ct. 3012 (1985), Justices Brennan, Marshall, and Blackmun criticized the decision of the Seventh Circuit and explained that:

> "[t]he particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense were they intended to be understood or what understanding they convey when used in the particular act."[4] We previously have been

[4] "2A C. Sands, Sutherland on Statutory Construction § 46.07, p 110 (4th ed 1984). See also United States v Campos-Serrano, 404 US 293, 298, 30 L Ed 2d 457, 92 S Ct 471 (1971) ('If an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered'); Lynch v Overholser, 369 US 705, 710, 8 L Ed 2d 211, 82 S Ct 1063, 20 Ohio Ops 2d 383 (1962) ('The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, . . . for [*literalness may strangle meaning*]'); United States v Brown, 333 US 18, 25-26, 92 L Ed 2d 442, 68 S Ct 376 (1948) ('The canon in favor of strict construc-

> confronted with "superficially appealing argument[s]" strikingly similar to those adopted by the Court today, and we have found that they "cannot survive careful consideration."

Simply, the Seventh Circuit's literal interpretation of the exception is wrong because it ignores the meaning which the words used by Congress were intended to convey. The literal interpretation of the Seventh Circuit is at odds with the clear congressional purpose. The Court is requested to grant Detrex's Petition to correct this error.

B. The Decision of the Seventh Circuit Directly Conflicts With *Dayton Indep.*

Respondents strain to distinguish the Seventh Circuit's decision from the opinion in the *Dayton Indep.* case. Although Respondents claim the two lawsuits are factually distinguishable, their recitation of the facts from *Dayton Indep.* actually demonstrates the substantial factual similarities between the two actions. See Detrex's Petition at 19. In *Dayton Indep.*, the asbestos containing building materials were released into the buildings just as, in this case, the trichloroethylene ("TCE") apparently occasionally spilled during deliveries.

Respondents' attempt to legally distinguish the two opinions is not persuasive. Both Courts squarely addressed the scope of the exception, one holding that asbestos containing building materials fell within the exception and the other concluding that the exception applies to facilities that are consumer products. A side-by-side analysis of the two holdings conclusively establishes

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tion is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language'). Cf. Harrison v Northern Trust Co.[,] 317 US 476, 479, 87 L Ed 407, 63 S Ct 361 (1943) ('words are inexact tools at best')."

that both Courts have vastly different explanations about how the exception applies:

> This approach does excessive violence to the statutory language. The exception is for facilities that *are* consumer products in consumer use, not for consumer products contained in facilities. Although read as it is written the exception is narrow, it is not meaningless, for the statute defines "facility" so broadly that it could be thought to include a can of lye. Since Detrex, not Elkhart, was responsible for the environmental damage resulting from the spillage of TCE from Detrex's trucks, there is no anomaly, so far as the purpose of the Superfund statute is concerned, in deeming Detrex a responsible person along with Elkhart. A literal interpretation that furthers the statute's purpose is hard to beat.

Petition at 8a.

> The provision exempting consumer products obviously was meant to protect from liability those who engage in production activities with a useful purpose, as opposed to those engaged in the disposal of hazardous substances. It is clear that Congress did not intend CERCLA to target legitimate manufacturers or sellers of useful products. Rather, taken in context, the provision reflects Congress' [sic] desire to hold liable those who would attempt to dispose of hazardous wastes or substances under various deceptive guises in order to escape liability for their disposal.

Dayton Indep., 906 F.2d at 1065-1066 (footnote omitted).

The two decisions cannot be reconciled. Despite the intensely similar fact scenarios, the Courts reach dramatically opposite conclusions. Respondents misleadingly assert that the Seventh Circuit expressly approved of the holding in *Dayton Indep.* The Seventh Circuit did not. It agreed with the Fifth Circuit that the asbestos contain-

ing building materials were consumer products under CERCLA just as the TCE was a consumer product in this case. Petition at 7a. That is the *only* legal similarity. The Fifth Circuit would have decided this case differently than the Seventh Circuit because "Congress did not intend CERCLA to target legitimate manufacturers or sellers of useful products." *Dayton Indep.*, 906 F.2d at 1065. The test of the Fifth Circuit focuses on the hazardous substance at issue while the test in the Seventh Circuit centers upon the container in which the hazardous substance is housed.

There is a direct conflict between these two decisions and the lower courts continue to struggle with this issue. The Court is requested to provide guidance concerning this question by granting Detrex's Petition.

II. LAWSUITS BETWEEN PRIVATE LITIGANTS UNDER CERCLA'S § 9607(a) PROVISION ARE FOR CONTRIBUTION.

A. The Decision of the Seventh Circuit Directly Conflicts With At Least Four Other Circuit Court Decisions.

The second issue which Detrex would raise on appeal is that apportionment of response costs should be made in CERCLA § 9607(a) actions. Respondents argue that this issue is somehow "rendered moot" because of Detrex's pending contribution action. This argument begs the question. Under the decisions of the lower courts, Detrex would be required to pay over one million dollars in response costs, hundreds of thousands of dollars in attorney fees, and prosecute a second costly lawsuit before receiving an equitable allocation of liability. Detrex filed the second lawsuit to preserve its rights, however, that action does not address the merits of the argument that district courts should equitably apportion response costs in CERCLA § 9607(a) actions. It certainly does not render the issue moot. Nor does it address the contribu-

tion protection issue which would prevent potentially responsible parties from filing a second action to avoid paying more than their fair share.

The Seventh Circuit does indeed stand alone in its decision concerning when district courts should address equitable apportionment issues. In the Seventh Circuit, an equitable apportionment of liability is not available unless a formal counterclaim or a second lawsuit is filed under § 9613(f) of CERCLA. No other circuit court has imposed a similar technical requirement and, in fact, several have reached exactly the opposite conclusion.

The opinion of the Seventh Circuit conflicts directly with the following four decisions which were brought under § 9607(a) of CERCLA. In *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989) the Court wrote, "Thus, once liability is established, the court must determine the appropriate remedy and which costs are recoverable. The court then must ascertain, under CERCLA's contribution provision, each responsible party's equitable share of the cleanup costs. § 9613(f)." In *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1517 (10th Cir. 1991) it was held that § 9613(f) is merely a mechanism for apportioning response costs in § 9607(a) actions. The Ninth Circuit in *In re Dant & Russell, Inc.*, 951 F.2d 246, 249 (9th Cir. 1991) held that § 9613(f) is to be applied in lawsuits filed under § 9607(a) of CERCLA as guidance in apportioning response costs. Most recently, in *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 270 n.29 (3d Cir. 1992), the Third Circuit held that contribution issues should be addressed in § 9607(a) lawsuits.

The Respondents expend a scant one and a half pages in their Opposition Brief trying to blur the clear distinction between these four cases as well as others. The decisions of the Third, Fifth, Ninth, and Tenth Circuits apply the *proper analysis* when private parties are litigating the recovery of response costs, *i.e.*, joint and several liability

is imposed under § 9607(a) of CERCLA and an equitable apportionment is made using the terms of § 9613(f) as guidance. The two provisions do not create separate causes of action.

This analysis does not render § 9613(f) mere surplusage. Section 9607(a) was enacted by Congress as CERCLA's liability provision under which responsible parties are held jointly and severally liable. The response costs are then equitably apportioned among the responsible parties, in the § 9607(a) action, using the terms of § 9613(f) as guidance for determining who pays how much.

B. The Decision of the Seventh Circuit Will Negate Contribution Actions and, Thereby, Result in Disproportionate Liability Which was not Intended by Congress.

The Seventh Circuit held that contribution among CERCLA responsible parties is not available unless a formal claim is made under § 9613(f). This decision is dangerous because of the contribution protection afforded by § 9613(f)(2) of CERCLA. If a responsible party settles with the government, it is immune from subsequent contribution actions for matters addressed in the settlement. Thus, if a settling responsible party recovers all its response costs in a § 9607(a) lawsuit, a fair share allocation of liability will not be available because of § 9613(f)(2). Respondents implicitly recognize the validity of this argument by failing to even address it in their Opposition Brief.

CONCLUSION

With respect to both issues which Detrex seeks to raise on appeal, there is a direct conflict of authority and an important question of federal law. The decision of the Seventh Circuit, if left standing, will needlessly multiply litigation and unnecessarily strain already overtaxed judicial assets. Therefore, Detrex respectfully requests that its Petition be granted.

Respectfully submitted,

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